Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000693-001 DT 03/22/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA KENNETH M FLINT

v.

DAWN E BURDO (001) JESSE SQUIER

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M–751–TR–2010–023501.

Defendant-Appellant Dawn Burdo (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in precluding her from presenting certain evidence. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

July 22, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and failure to drive in one lane, A.R.S. § 28–729(1). The State subsequently amended the Complaint to charge her with driving under the extreme influence, A.R.S. § 28–1382(A)(1).

Defendant proceeded to a jury trial in this matter. After the State had rested its case, Defendant presented the testimony of her criminalist, Erik Brown. (R.T. of July 7, 2011, at 409.) During his testimony, the following exchange occurred:

> Q. [by Mr. Squier, Defendant's attorney]: Okay. If somebody has candida albicans in their blood, how does that work as it relates to the sugar [in the blood]?
>
> MR. DE LA CRUZ [the prosecutor]: Objection; relevance, speculation, unless there's going to be an offer of proof that there was—that actually occurred with this defendant's blood in this case.
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> MR. SQUIER: May we approach?
>
> THE COURT: You may.

(R.T. of July 7, 2011, at 438.)

[Out of the presence of the jurors.]

THE COURT: All right. We're back on the record. And we have an issue with regard to for [*sic*] lack of disclosure of—of the defense theory. Mr. De La Cruz, why don't you go ahead and put your objection on the record, and then we'll let Mr. Squire address that.

MR. DE LA CRUZ: Well, as far as the defense raising the issue of candida albicans, the State would object at this time, because apparently what I heard, Judge, and correct me if I'm wrong, it sounds like defense is saying defendant's going to get up on the stand and testify that she has that in her blood. So, if that's the case, we had no notice of that defense. . . .

THE COURT: Go ahead, Mr. Squire, I'll let you be heard on that.

MR. SQUIER: Thank you Judge. I just would point out under the 15.1, under Number 19, victim's [*sic*] medical records were made available for review. I don't know if they were turned over. I don't have a copy of that in my file. Like I said, it's the trial notebook, not a complete notebook, but it was disclosed, the medical records there, and then the affirmative defenses—

THE COURT: Well, when you say it was disclosed, do you—

MR. SQUIER: Oh, I'm sorry, Judge, availability.

THE COURT: —you simply said that the defendant's medical records were available to the State if the State decided—determined to seek them.

MR. SQUIER: That's correct.

THE COURT: Well, in practical aspect, sir, can we really expect the State to request every single defendant's medical records in every single case and then hire a medical expert to screen out any things you might bring up without having told them about it at trial? I mean, at best, that's nowhere cost effective. You can't expect them to—to take that bait; right?

MR. SQUIER: Well—well, Judge, I can—I can understand what you're saying, but it's—I don't think we're asking for that in every single case. I mean, it's—there's a—a small, very small percentage that actually go to trial. And I'm willing to proceed for a retrial.

(R.T. of July 7, 2011, at 439–41.)

THE COURT: . . . That's not why we have disclosure. That's trial by ambush. So that's insufficient.

MR. SQUIER: I understand, Judge.

THE COURT: What else do you have? Any other disclosure than this?

MR. SQUIER: Not that I can see, Judge. All I can—all I see is, as pointed out by Mr. De La Cruz, the invalidity of the blood tests and the fact that the blood alcohol was

not in excess of .08 or a .15. I don't know that candida was ever specifically pointed out. But what I would say in response to your arguments, the cost effectiveness, that I think due process ranks overrule any sort of budgets or cost effectiveness, just for the record. I understand what you're saying.

THE COURT: Sir, they do if it was disclosed. If you disclosed it and they were arguing that they didn't have the money to delve into that, you win that argument every time. All right? But you can't spring on, the second day of a two-day trial, that you've got some novel medical defense and not having—you haven't given them any heads-up whatsoever, except, oh, by the way, if you want to get my client's medical records, you can. That's just absolutely insufficient.

When did this, if your client testifies, if she testifies that she has this organism in her blood, when did she learn of this? Can you give me an offer of proof of that? Is it something she found out last night at a doctor's appointment?

MR. SQUIER: No, Judge, we—she's known about it for some time.

THE COURT: Okay. Absent something that I haven't heard yet, I'm going to rule that that's—we're not going down that rathole.

MR. SQUIER: Okay. Very good.

THE COURT: Okay? All right. So, on the record then, the State will be—or the defense will be precluded from bringing up the candida organism argument due to lack of disclosure. If [*sic*] appears to me that there was actually no disclosure on that, other than the defense offering access to the defendant's medical records, no forewarning of that defense, so that'll be precluded. Go ahead and bring the jury back in.

MR. DE LA CRUZ: And, obviously, we'd move to preclude if defendant—defendant testifies that she—any reference to any medical condition that relates to candida, as well.

THE COURT: Yes, because of lack of disclosure; correct, right, yes.

MR. DE LA CRUZ: Yes.

MR. SQUIER: Well, and just for the record, Judge, just to fully supplement, I heard you say novel medical approach, and I understand you mean as it pertains to this particular case or disclosure in this particular case.

THE COURT: Correct.

MR. SQUIER: What I would point out is, this is not a novel argument. This is not the first time candida's ever been raised in a courtroom for blood testing, particularly with this type of scenario we're going to be arguing about margins of error, and things along those lines. So it's not new to the State.

> And I don't get the sense that Mr. De La Cruz is arguing he's never heard of candida before. I understand his—his argument is about, you know, speculation and hypotheticals. But at the same time, it's not a new defense. It's certainly been a defense that's been presented before by many other attorneys in many other courtrooms.
>
> So I think along those lines, I'm just, you know, renewing my argument. I understand Your Honor's already ruled on it, but just to supplement the record.
>
> THE COURT: And, again, just so we're all clear, I understand that, Counsel. I know it's not a new approach. What I'm getting at is, if you had never mentioned any problems about the testing procedure in any of your Disclosure Statements and then today you tried to go into that, I'd prevent you from doing so for the same reason, lack of disclosure.
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> MR. SQUIER: Very good.
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> THE COURT: The State has to prepare a case in response to what you've told them by the rules that you're going to do.
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> MR. SQUIER: Right
>
> THE COURT: If there was no mention of any of this defense, I'm not going to hold them to the burden of defending it in a trial with no disclosure. That's why we have the disclosure rules. And I understand due process is incredibly important. It's more important than anything else in this courtroom. But there are rules that do apply to the defense, as well.
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> MR. SQUIER: Very good, Judge.
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> THE COURT: Okay. Good enough. Go ahead and bring the jury in. So when the jury comes in, I'm simply going to sustain the objection and then we'll go from there.
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> MR. SQUIER: Very good.
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> MR. DE LA CRUZ: Yes.

(R.T. of July 7, 2011, at 443–47.)

The jurors found Defendant guilty of both counts of driving under the influence, and the one count of driving under the extreme influence. (R.T. of July 7, 2011, at 617.) The trial court later found her responsible for failure to drive in one lane. (R.T. of July 12, 2011, at 626.) The trial court then imposed sentence. (*Id.* at 627–28.) On July 21, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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II. ISSUES.

A. *Did the trial court abuse its discretion in finding Defendant had failed to comply with the discovery rules and thereby precluding Defendant's proposed evidence.*

Defendant contends the trial court abused its discretion in precluding her proposed evidence. The imposition and choice of sanction are within the discretion of the trial court, and an appellate court will not disturb the trial court's ruling unless the defendant can show both (1) an abuse of discretion and (2) prejudice. *State v. Jackson*, 186 Ariz. 20, 24, 918 P.2d 1038, 1042 (1996). The court may impose preclusion as a sanction if a party fails to make disclosure required by this Rule. *State v. Thompson*, 190 Ariz. 555, 557–58, 950 P.2d 1176, 1178–79 (Ct. App. 1997) (defendant disclosed witness on first day of trial; because defendant gave no explanation for tardy disclosure, trial court did not abuse discretion in precluding witness). Further, to preserve for appeal the question of exclusion of evidence, a party must make a specific and timely objection, and must make an offer of proof showing the excluded evidence would be admissible and relevant. *State v. Dixon*, 226 Ariz. 545, 250 P.3d 1174, ¶¶ 40–44 (2011) (defendant contended trial court erred in precluding him from introducing entries from victim's diary; defendant failed to make offer of proof, thus court had no basis for determining precisely what evidence was excluded). Based on the record presented on appeal, this Court concludes Defendant has failed to show the trial court abused its discretion in its ruling.

The applicable discovery rule provides as follows:

> **b. Notice of Defenses.** Within the time specified in Rule 15.2(d), the defendant shall provide a written notice to the prosecutor specifying all defenses as to which the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, and good character. The notice shall specify for each listed defense the persons, including the defendant, whom the defendant intends to call as witnesses at trial in support of each listed defense. It may be signed by either the defendant or defendant's counsel, and shall be filed with the court.
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> **c. Disclosure by Defendant; Scope.** Simultaneously with the notice of defenses submitted under Rule 15.2(b), the defendant shall make available to the prosecutor for examination and reproduction the following material and information known to the defendant to be in the possession or control of the defendant:
>
> (1) The names and addresses of all persons, other than that of the defendant, whom the defendant intends to call as witnesses at trial, together with their relevant written or recorded statements;
>
> (2) The names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments or comparisons that have been completed; and

> (3) A list of all papers, documents, photographs and other tangible objects that the defendant intends to use at trial.

Rule 15.2(b) and (c), ARIZ. R. CRIM. P. When the trial court asked Defendant's attorney where he had made a disclosure of candida albicans, he noted the "victim's medical records were made available for review." (R.T. of July 7, 2011, at 440.) All parties assumed Defendant's attorney meant Defendant's medical records, which would have been sufficient to satisfy the disclosure requirement of Rule 15.2(c)(3) (all papers, documents, photographs, and other tangible objects the defendant intends to use at trial). Those medical records would not have been sufficient, however, to satisfy that part of Rule 15.2(b) that requires the defendant to provide a written notice to the prosecutor of all defenses for which the defendant intends to introduce evidence at trial. Further, the witness testifying was Erik Brown, and Defendant's attorney did not list Mr. Brown as a witness. Thus, Defendant failed to comply with that part of Rule 15.2(b) that requires the defendant to specify for each listed defense the persons whom the defendant intends to call as witnesses at trial in support of each listed defense. Finally, Defendant's attorney failed to comply with Rule 15.2(c)(1), which requires the defendant to disclose the names and addresses of all persons whom the defendant intends to call as witnesses at trial, together with their relevant written or recorded statements, and Rule 15.2(c)(2), which requires the defendant to disclose the names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments, or comparesons that have been completed. Thus, the trial court did not abuse its discretion in finding Defendant had failed to meet the disclosure requirements of Rule 15.2.

Further, the records show Defendant failed to establish prejudice in the trial court's ruling. Defendant's attorney failed to make an offer of proof, so this Court has no way of determining exactly what evidence Defendant wanted to present. All the record shows is the prosecutor objected when Defendant's attorney asked the expert witness the following question:

> If somebody has candida albicans in their blood, how does that work as it relates to the sugar [in the blood]?

(R.T. of July 7, 2011, at 438.) Out of the presence of the jurors, the prosecutor said the following to the trial court:

> Well, as far as the defense raising the issue of candida albicans, the State would object at this time, because apparently what I heard, Judge, and correct me if I'm wrong, it sounds like defense is saying defendant's going to get up on the stand and testify that she has that in her blood.

(*Id*. at 439–40.) Because Defendant's attorney never made any offer of proof, there is nothing in the record to show (1) what exactly was in Defendant's medical records (*i.e.*, whether Defendant had candida albicans); (2) what candida albicans is, (3) whether candida albicans does get into the blood, (4) what effect candida albicans would have on sugar in the blood, or (5) how this would affect any evidence that was admitted, such was Defendant's BAC. Because there is no

offer of proof, this Court has no way of determining what Defendant's proposed evidence was and no way of knowing whether that evidence was relevant and otherwise admissible. Defendant thus has failed to show she was prejudiced by the trial court's preclusion of Defendant's proposed evidence. Defendant has therefore failed to show the trial court abused its discretion in determining Defendant's attorney failed to comply with the applicable discovery rules and in imposing sanctions as a result.

B. *Has Defendant waived any claim that the trial court's ruling violated her constitutional rights.*

Defendant contends the trial court's imposition of preclusion as a discovery denied her the due process right to present a defense. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron,* 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff,* 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz,* 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). In the present case, Defendant never made a claim to the trial court that preclusion of her candida albicans evidence denied her due process. Thus, this Court's review is limited to fundamental error. Based on that review, this Court concludes Defendant has failed to show either that error existed or that she was prejudiced.

The United States Supreme Court has held the Sixth Amendment right to present evidence does not preclude a state from imposing preclusion as a sanction for a discovery violation. *Taylor v. Illinois,* 484 U.S. 400, 410–16 (1988). Defendant's attorney acknowledged Defendant had known about candida albicans for some time. (R.T. of July 7, 2011, at 444.) Defendant's attorney gave no excuse for failing to make the required disclosure of this defense. Thus, Defendant has failed to show any constitutional violation.

Moreover, Defendant has failed to show any prejudice. As noted above, because Defendant failed to make an offer of proof, so there is no indication in the record what candida albicans is or how it relates to a defendant's BAC. Defendant's attorney stated to the trial court "this is not a novel argument," and "not the first time candida's ever been raised in a courtroom for blood testing." (R.T. of July 7, 2011, at 445.) In this Court's research, it has found no Arizona case that discusses candida albicans. This Court has found four published opinions from other states that discuss candida albicans, but none of those cases involved a person's blood alcohol content. *Alphonse v. Acadian Ambulance Serv., Inc.,* 844 So. 2d 294, 297 (La. Ct. App. 2003); *Aldridge v. Edmunds,* 750 A.2d 292, 294 (Pa. 2000); *In re Doe,* 978 P.2d 166, 169 n.1 (Hawaii 1999); *People v. Camargo,* 516 N.Y.S.2d 1004, 1005 (Sup. Ct. Bronx Cty. 1986). Defendant has thus failed to show prejudice.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not abuse its discretion in precluding Defendant's proposed evidence.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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